In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1331

CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

GEORGE P. BAKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-10a) is reported at 508 F.2d 279. The opinion of the district court (Pet. App. D, 24a-33a) is reported at 370 F. Supp. 22.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A, 11a-14a) was entered on January 22, 1975. The petition for a writ of certiorari was filed on April 22, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioners have also reproduced an earlier opinion of the district court (Pet. App. C, 19a-23a) referring certain matters to the Interstate Commerce Commission and the two resulting opinions of the Commission (Pet. App. E, 34a-72a; Pet App. F, 73a-96a). See Pet. 1-2.

QUESTIONS PRESENTED

1. Whether Section 202 of the Rail Passenger Service Act of 1970 (the "Act"), 45 U.S.C. 522, precludes petitioners from suing Amtrak to surrender part of its service because petitioners seek judicial review of the basic system of intercity rail passenger transportation reported to Congress by the Secretary of Transportation, whose designation is made non-reviewable by Section 202.

2. Whether, in view of Section 307(a) of the Act, 45 U.S.C. 547(a), parties other than the Attorney General of the United States may sue to compel Amtrak to surrender part of its service on the ground that Amtrak is operating such service in violation of the Act.

STATEMENT

Since May 1, 1971, respondent[2] National Railroad Passenger Corporation ("Amtrak") has operated a series of trains between Harrisburg and Philadelphia, Pennsylvania (the 600 series) and between Philadelphia and New York City (the 200 series), subject to the provisions of the Rail Passenger Service Act of 1970 (the "Act"), 84 Stat. 1327, as amended, 45 U.S.C. 501, *et seq.* Prior to that time, these trains were operated by the Trustees of the Penn Central Transportation Company (the "Trustees"), subject to regulation under state law. In April 1971, the Trustees entered into a contract with Amtrak under Section 401 of the Act, 45 U.S.C. 561, for Amtrak to take over the service in question on May 1, 1971.

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[2]Petitioners are the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission and the United Transportation Union; respondents are the Trustees of the Property of the Penn Central Transportation Company, the National Railroad Passenger Corporation ("Amtrak") and the United States.

Shortly before the effective date of the contract, petitioners brought an action in the United States District Court for the Eastern District of Pennsylvania[3] claiming that the Trustees' discontinuance of the 200 and 600 series trains would violate the Act because these were commuter, not intercity, trains and therefore could not be discontinued under the Act (Pet. App. 5a-6a, 25a).

On April 30, 1971, the district court entered Order No. 244 in the reorganization proceedings, referring the question of the intercity or commuter status of the trains to the Interstate Commerce Commission, without, however, specifying the grounds for the referral. The court also directed that the Trustees' intercity rail passenger service including the 200 and 600 series trains be discontinued, but that the Trustees should resume the operation of these trains if, before the Commission's determination, the trains were discontinued by Amtrak (Order No. 245) (Pet. App. 6a).

In June and July, 1971, the Commission determined that the 200 and 600 series trains were not "intercity rail passenger service" within the meaning of Section 102(5) of the Act, but were commuter service. Finance Docket No. 26632, 338 I.C.C. 621 (the 600 series trains); Finance Docket No. 26634, 338 I.C.C. 690 (the 200 series trains) (Pet. App. 34a-72a, 73a-96a). The Commission issued no orders; its opinions were rendered on an advisory basis pursuant to the request of the reorganization court (Pet. App. 35a, 54a, 74a, 86a).

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[3]This district court (the reorganization court), which was supervising the reorganization of the Penn Central under Section 77 of the Bankruptcy Act, 47 Stat. 1474, as amended, 11 U.S.C. 205, had previously entered an order enjoining petitioners, among others, from instituting or maintaining any litigation affecting the discontinuance of Penn Central's passenger trains in any court other than the Eastern District of Pennsylvania. See *In re Penn Central Transportation Co.*, 329 F. Supp. 387 (E.D. Pa.), affirmed, 446 F.2d 1109 (C.A. 3).

Petitioners then requested the reorganization court to direct the Trustees to resume operation of the trains; petitioners also filed an additional plenary action in the district court, seeking judicial enforcement of the two Commission decisions and a declaration that the Trustees may not be relieved of the responsibility of the disputed service. Petitioners later requested the convening of a three-judge court in both plenary actions, pursuant to 28 U.S.C. 2325 (Pet. App. 6a-7a).

The district court[4] granted respondents' motions to dismiss the plenary actions, denied petitioners' motions to convene a three-judge court, and refused petitioners the relief which they sought in the reorganization proceedings. The court held that a three-judge court was not required in the plenary actions because the Commission's reports were not "orders" within the meaning of 28 U.S.C. 2325. The court further held that the 200 series and 600 series trains were either part of the initial "basic system" of intercity passenger service under the Rail Passenger Service Act or had been made part of the basic system by operation under Amtrak contracts. The court held that Section 202 of the Act, 45 U.S.C. 522, made unreviewable the selection of trains for the basic system by the Secretary of Transportation and that Section 307, 45 U.S.C. 547, as interpreted by this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, precluded judicial review in a suit not brought by the Attorney General (Pet. App. D, 26a-29a, 33a).

The court of appeals affirmed (Pet. App. A, 1a-10a) on the ground that the trains constituted part of the initial basic system submitted by the Secretary of Transportation to Congress and that his decision to include them is specifically made unreviewable by Section 202 of the Act, 45 U.S.C. 522.

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[4] *In re Penn Central Transportation Co.*, 370 F. Supp. 22 (E.D. Pa.) (Pet. App. D, 24a-33a).

ARGUMENT

There is no reason for this Court to review the judgment of the court of appeals. This litigation dates from 1971, when Amtrak first began operating a nationwide intercity rail passenger network. So far as we are aware, it is the last pending case involving a challenge to the discontinuance by a railroad of trains pursuant to its contract with Amtrak under 45 U.S.C. 561 and future cases are unlikely to arise.[5]

In any event, the decision below is correct. The series 200 and 600 trains were included in the Secretary of Transportation's 1971 final report submitted to Congress (Pet. App. A, 9a; 45 U.S.C. 521). Both the district court and the court of appeals found that the rail service in question here constitutes part of the "basic system"of Amtrak. Congress explicitly entrusted the composition of this basic system to the Secretary of Transportation and exempted his decision from judicial review. 45 U.S.C. 522. The court of appeals thus correctly upheld the dismissal of petitioners' suit to have the rail service transferred back to the Penn Central Trustees.

Moreover, petitioners' argument essentially is that, under the Rail Passenger Service Act, Amtrak has no authority to operate the trains because these (or some of them) are, in petitioners' view, properly classified as commuter trains. This amounts to a claim that the Rail Passenger Service Act was violated when these trains were made

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[5]Amtrak's operations are reviewed and scrutinized by Congress on a regular basis in connection with the reports and legislative recommendations submitted by Amtrak to Congress pursuant to Section 308 of the Act, 45 U.S.C. 548. In certain instances, Congress has specified to Amtrak what additional service Amtrak may operate, *e.g.*, 45 U.S.C. (Supp. III) 563(d) and 601(b), or what service it may discontinue, *e.g.*, 45 U.S.C. (Supp. III) 564(b)(1) and (2).

part of the basic system. But only last Term, this Court held in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, that Section 307(a) of the Act, 45 U.S.C. 547(a), prohibits a suit against Amtrak or a private railroad for violation of the Act unless the suit is brought by the Attorney General or involves a labor agreement. 414 U.S. at 457, 464.

In order to avoid this prohibition, petitioners argue (Pet. 16-18) that their actions are not brought under the Rail Passenger Service Act but under state law. However, Paragraph III of the complaint in *City of Philadelphia* v. *Baker* states explicitly "[t]his action is brought pursuant to * * * 45 U.S.C. 501 *et seq.* * * *" and the prayer of the complaint seeks a declaration, in accordance with the advisory opinions of the Commission, that Amtrak is operating the trains in question in violation of Section 102(5) of the Act, 45 U.S.C. 502(5). Paragraph IV of the complaint in *Commonwealth of Pennsylvania* v. *Baker* links that complaint to *City of Philadelphia* v. *Baker*. In short, there can be no doubt that the gravamen of petitioners' pleadings is that Amtrak's operation of the trains in question here is in violation of the Act. Compare 414 U.S. at 454-455. The congressional scheme for the rehabilitation and restoration of intercity rail passenger service embodied in the Act, as interpreted by this Court in *Railroad Passengers, supra*, does not permit such complaints except by the Attorney General. The district court there-

fore properly dismissed petitioners' complaints on this ground, which the court of appeals found unnecessary to reach (Pet. App. 10a n.5).[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1975.

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[6]Petitioners contend (Pet. 9-11) that the decision of the court of appeals conflicts with the decision of the District of Columbia Circuit in *Potomac Passengers Association* v. *Chesapeake and Ohio Ry. Co.*, 475 F.2d 325 (1973), and two district court decisions in Illinois, *Illinois Commerce Commission* v. *United States*, 346 F. Supp. 910 (S.D. Ill., 1972), and *People of State of Illinois* v. *United States*, 371 F. Supp. 1136 (N.D. Ill., 1973), which permitted suits by parties other than the Attorney General to contest discontinuance of trains as violative of the Rail Passenger Service Act. All of these decisions were rendered before this Court's decision in *Railroad Passengers, supra*. Moreover, each is concerned with suits by private litigants to prevent railroads from discontinuing services *not* taken over by Amtrak. The present litigation to compel surrender of service which Amtrak does operate has a far more direct impact upon Amtrak's ability "to fashion and operate a viable system of intercity passenger service" (Pet. App. 27a-28a). There is thus no conflict with those decisions, which are in any event of doubtful authority in light of this Court's decision in *Railroad Passengers*.